No. 10607

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LESTER ARTHUR CORSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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PETITION FOR REHEARING.

Comes now the United States of America, appellee in the above entitled cause and presents this, its Petition for Rehearing of the above entitled cause, and in support thereof respectfully shows:

Statement of Grounds for Rehearing.

That the opinion of this Honorable Court, reversing the judgment of conviction in the above entitled case:

(1) Misconstrues and overlooks the factual situation on which the conviction was based and the application of the instructions as given to said factual situation.

(2) Considers the instructions given in the trial court as applying to a factual situation which did not exist in the trial of the case.

(3) Disregards entirely the rule that error must be prejudicial before a conviction will be reversed.

(4) Ignores the fact that no instructions were requested by the defendant, appellant herein, as to the manner in which a transfer of gas coupons could be made in accordance with Ration Order 5 C.

(5) Ignores the fact that the instruction which this Court claims sets no standard of conduct was an instruction requested by the appellant.

(6) Ignores the fact that the point upon which this Court reversed the conviction was never raised in the trial court, and that the trial Judge therefore did not have his attention directed to the purported source of error.

(7) Ignores the fact that although an exception was taken to the instructions, no exception was taken to the particular instruction upon which the Court bases its reversal, except upon general constitutional grounds.

(8) Ignores the rule that the appellant had the burden of showing by his defense and by proper instructions proposed by him, the legality of the transfer if he so claimed.

(9) Reverses the conviction of a man, plainly guilty, who has a prior criminal record, because of the giving of instructions, one of which was requested by the appellant, which were not excepted to by the appellant, except upon constitutional grounds, upon an issue which was never raised in the trial court; and that the said opinion purports to turn on an issue which is not and was not in the case, to-wit, the *method* by which a legal transfer *might* be made.

Questions of Law.

(1) Did the District Judge commit reversible error by the "failure to instruct the jury respecting the content of Ration Order No. 5 C as amended to the date of the Information * * *" (quoting from the opinion)?

(2) Were the Court's instructions sufficient, in view of the limited factual issue in the case?

(3) Was the instruction given by the District Judge as to the content of Section 1394.8177 of Ration Order No. 5 C a correct statement of that portion of Ration Order No. 5 C as it then read, in view of prior amendments to Ration Order No. 5 C?

(4) Can the appellant complain of an instruction which he himself requested?

(5) Can the appellant complain of an instruction to which he did not except?

(6) Can the appellant, having made an exception to the instruction on Section 1394.8177 of Ration Order No. 5 C, based upon his contention that Congress cannot make a delegation of powers, thereafter raise for the first time on appeal a new contention under said exception?

(7) Was there any prejudicial error or miscarriage of justice?

(8) Did the Information fail to state a public offense, having in mind that no bill of particulars was asked for?

The questions will be considered under the following headings:

(1) The District Court did not err in instructing the jury.

(2) The Information states an offense against the United States.

Statement of Facts.

The factual situation has not been set forth in the opinion.

The facts as set forth below will show that *the real issue tried by the jury, was whether or not Corson made a transfer of "TT" coupons to one Thompson and not the issue of whether or not the transfer was made in a manner in accordance with Ration Order No. 5 C.*

The facts showed that John E. Foster and Jona H. Taylor, investigators for the OPA on September 2, 1943, arrested Edgar E. Thompson [R. 70]; that they searched his person and his car and then followed him while he went to a used car lot, where he met the defendant Corson [R. 71]; that Foster and Taylor parked across the street, and while Thompson was at all times within their vision, saw him talk to Corson and saw Corson take from his inside coat pocket a white folded package 12" to 14" long and 3" to 4" wide and hand it to Thompson. Thompson placed it in the inside right hand pocket of his loafer jacket [R. 74].

Immediately Taylor and Foster crossed the street, apprehended Corson and Thompson. In the right hand outside pocket of Thompson's loafer jacket were found four sheets of "TT" gas coupons used by and issued to fleet owners. These sheets of ration coupons were received in evidence as Government's Exhibits No. 1, 2, 3 and 4. Exhibits No. 1, 2 and 3 consisted of 240 coupons each and Exhibit 4 consisted of 80 coupons, making a total of

800 coupons, each good for 5 gallons of gasoline, equivalent to 4000 gallons [R. 76].

Corson was arrested and the Information filed.

Upon cross-examination counsel for appellant brought out from the witness John E. Foster that Thompson had said to Foster that he had an appointment to buy some stamps on that day, that he was due at the car lot at that time and that he would keep his appointment, and that accordingly Foster and Taylor followed him to the car lot where they observed the transfer of coupons [R. 80].

Lester Arthur Corson, the defendant and appellant herein took the witness stand. He stated he was in the used car business [R. 114].

He positively denied any transfer or assignment of gasoline ration coupons to Thompson [R. 116]. "I did not at any time transfer or assign any gasoline ration coupons to him (Thompson). I did not at any time transfer 800 type "TT" gasoline coupons. I did not go anywhere into my lot and get any 800 "TT" gasoline coupons" [R. 116].

On cross-examination Corson stated [R. 118] "I am not in the trucking business, I never had issued to me by any ration board Government's Exhibits 1, 2, 3 and 4. I don't claim to have any right to the possession of these * * *. The only paper I had was when he (Thompson) handed me the pink and white slip and I handed it back to him".

From the foregoing it is crystal clear that Corson, a used car salesman had never had the "TT" coupons issued to him, did not claim any right to the possession of them and denied he had ever received them, and the sole factual issue in the case was a very simple question—

Did Corson, on September 2, 1943, transfer to Thompson 800 "TT" gas ration coupons?

There was no issue as to how and in what manner Corson might have made a transfer of the coupons to Thompson, under some provision of Ration Order 5 C.

The Government is of the opinion that the factual problem before a District or Circuit Court should be considered in connection with any decision rendered, and that this Court cannot ignore the fact that the sole issue was the one above stated, and that with this issue in mind the instructions given by the District Judge were proper and sufficient instructions.

ARGUMENT.

I.

The District Court Did Not Err in Instructing the Jury.

(1) The Instructions of the Court as Applied to the Facts in Issue Were Not Erroneous.

The ultimate issue of fact before the jury was whether or not appellant Corson transferred 800 "TT" coupons to Thompson. Corson made no contention that he made the transfer or was entitled to make the transfer but testified he was a used car salesman [R. 114], that the coupons had not been issued to him by any ration board [R. 118] and that he made no claim to the possession of them.

With these facts in mind the Government submits that it was unnecessary and probably would have been an error for the court to have given the jury instructions as to how transfers might be made, in accordance with Ration Order 5 C. The District Court believed this unnecessary and merely instructed the jury in the language of Ration Order No. 5 C, Section 1394.8177, that no person shall assign or transfer any gasoline coupons except in accordance with the provisions of the Ration Order.

The fact that the transfer might be made in accordance with Ration Order 5 C is a defense to the charge herein. The lawful means of transferring gasoline coupons (in exchange for gasoline) is an exception to the general prohibition of transferring them in any other way. And the

burden of bringing himself within such a defense or exception is upon the defendant.

McKelvey v. United States, 260 U. S. 353 (1922);

Williams v. United States, 138 Fed. (2d) 81 (C. A. D. C. 1943);

Greene, Moore & Company v. United States, 19 Fed. (2d) 130 (C. C. A. 5th 1927);

Merritt v. United States, 264 Fed. 870 (C. C. A. 9th 1920).

He has not assumed that burden and thus any instructions upon the method of transfer are not necessary. The defendant's counsel also must have recognized that fact for he did not request further detailed instructions or object and except to those given on the ground of insufficiency. To find otherwise would be to find that the defendant's counsel invited error.

The Government submits that this Court in rendering its decision in the above entitled matter, has overlooked completely the factual situation that was presented and the application of the instructions to that factual situation; that this Court has ignored the fact that the case was tried upon the factual issue as to whether or not there was actually a transfer of the coupons, and not upon any issue or upon any defense that a transfer had been made in accordance with Ration Order 5 C.

(2) Section 1394.8177 of Ration Order No. C as Given to the Jury Was Within the Correct Wording of the Section as It Then Stood.

There is language in the decision from which it might be inferred that this Court entertained some belief that Section No. 1394.8177 of Ration Order No. 5 C as given to the jury might have been amended so that the instruction as given did not correctly state the context of the section. We make this observation for the reason that during the trial and on the appeal, counsel for the appellant repeatedly complained of a number of amendments to Ration Order No. 5 C and of his inability to ascertain what the regulations provided. We do not believe the court meant its language in such sense. The court can take judicial notice of the regulations in Ration Order No. 5 C and therefore notes that the section as given in the instruction was the correct wording of the section.

(3) The Appellant Requested in the Trial Court the Instruction Which This Honorable Court Holds Fixed No Standard of Conduct.

The Record contains the only instructions requested by the defendant [R. 133, 134]. They were five in number.

The giving of defendant's requested instruction No. 1 [R. 133] was obviated when the Government elected to rely upon count No. 2. The wording of the first paragraph of defendant's requested instruction No. 2 [R. 133] was obviated when the Government elected to stand on the transfer count, two of the Information.

The court fully charged the jury as to reasonable doubt [R. 126, 127].

In the third paragraph of defendant's requested instruction No. 3 [R. 134] appears the language which was used verbatim by the court in its instructions [R. 129.] *This instruction was requested by the defendant and given exactly as requested, and yet this Court has ruled that the giving of such instruction fixed no standard of conduct.* We respectfully submit that appellant cannot complain of the instruction requested by him.

(4) Appellant Did Not Except to the Instructions Except Upon a Constitutional Ground.

It is obvious that the appellant would not and could not except to an instruction which he himself requested. It is interesting to read the Record [R. 131] in connection with the exception which was noted. Throughout the proceeding the appellant continually raised Constitutional objections to the Information. In the *Motion to Quash* [R. 6-7] Point I contended that the Information failed to charge a public offense. Points 2 to 9 inclusive raised Constitutional questions. Point 12 referred generally to Point I contended that the Information failed to charge a public offense. Points 2 to 9 inclusive raised questions of the Constitutionality of the proceeding.

In the *Motion for a new trial* [R. 21, 22, 23] Point 1 raised the general point that the verdict was contrary to the law in the evidence. Point 2, that the Information was filed without probable cause. Point 3, that it failed to state a public offense. (Points 4 to 11 inclusive raised Constitutional questions.) Point 12 referred generally to errors in rulings during the trial. Point 13 stated the "Court erred in instructions given and particularly in giving the instruction that a crime exists through violation of an executive order" [R. 23]. Point 14 contended

there was no probable cause for the filing of the Information and that the proceedings violated Section 591, Title 18 U. S. C. A. and Section 995 of the Penal Code, State of California. Point 15 made the contention that there had been 82 amendments to Ration Order No. 5 C and that an amendment or change repeals the regulation. Point 16 contends the Information was sworn to improperly.

In the *Motion in arrest of Judgment* [R. 26, 27 and 28] the same identical points were made as in the Motion for a New Trial.

In the *grounds for appeal* [R. 33, 34] Point 1 contends generally that the evidence was insufficient to support a conviction. Point 2, that the verdict was contrary to law and evidence. Point 3, that no public offense was stated. Point 4, that there was no probable cause upon which the Information was based. Point 5, that the court in rulings during the trial and on the Motion for a New Trial and in arrest of Judgment. Point 6 stated "The Court erred in instructions given, particularly on the question of violation of law created by Executive Order" [R. 34]. Points 7, 8 and 9 raised Constitutional questions.

The only other portion in the Record as printed where any purported exceptions appear, is that portion of the Record at pages 135, 136 and 137. These are the general collection of exceptions which it is the practice of the attorney for petitioner to insert in his bill of exceptions after the trial of the case. It apparently does not concern counsel for appellant whether or not the exceptions were actually taken or noted. It is submitted that the Record affirmatively shows that certain of the exceptions purportedly taken as listed at pages 135 to 137 do not appear in the Record and have merely been added above the signa-

ture of counsel for the appellant, under the general heading "exceptions".

Within these purported exceptions is included No. 13, in which Counsel purports to have excepted to the instruction of the Court in giving the instruction containing Section 1394.8177 of Ration Order No. 5 C. The Record does not bear him out.

After the instructions were given by the Court, the Court inquired of Counsel for the appellant if he had any exceptions [R. 130]. There then follows the statement of counsel in which he again attempts to raise the Constitutional question which he had repeatedly raised throughout the trial. The Court replied, "A portion of those instructions were taken from the instructions you yourself proposed, Mr. Levine:

> "Mr. Levine: Not that one I am referring to, Your Honor. The one I am referring to now is one Your Honor gave from the Government's instructions.
>
> The Court: The portion of the definition of the Section about Ration Order No. C is that what you meant?
>
> Mr. Levine: That is right. Exception noted.
>
> The Court: All right." [R. 131.]

It is submitted that this sole exception to the instructions of the Court was based by the very words of counsel for the appellant upon the constitutional contentions which he then raised.

The Government submits that no exception was taken to the instructions quoted in the opinion in the 4th paragraph on page 3 thereof, and that the only exception taken to the instruction quoted in the 3rd paragraph of page 3, was the exception based upon constitutional grounds.

(5) There Was No Prejudicial Error or Miscarriage of Justice in the Case.

It is and should be policy of the Appellate Courts in the Federal Judicial system not to reverse convictions unless there has been prejudicial error or a miscarriage of justice. The Government submits that neither existed herein. From the facts stated in this petition, it is apparent that the defendant trafficked in "TT" gasoline ration coupons, that he was in the used car business and was not a truck operator [R. 118].

Title 18 USC §556 states in part:

> "* * * nor shall the trial, judgment or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant".

It is obvious from the Record and from the facts which were in issue before the jury, that had the Court given the jury the complete text of Ration Order No. 5 C and pointed out the method by which legal transfers could be made, there could have been no different result, since the defendant denied making the transfer and in substance took the position that he would stand or fall on the question as to whether or not he had transferred the coupons to Thompson.

II.

The Information States an Offense Against the United States.

While the Court bases its reversal solely upon the failure to sufficiently instruct the jury, it does remark upon the "claimed sufficiency of the information". Appellee, therefore, believes that in this Motion for Rehearing, it should consider the comments of the Court upon that point and reemphasize that Count Two of the Information sufficiently charges an offense.

The government alleged the offense in the words of the statute and order. That such a method is sufficient, provided the statute and order set forth all the elements of the crime, has been universally held. This Court has recognized the method in *Peters v. United States*, 94 F. 127 (1899). In *Ledbetter v. United States*, 170 U. S. 606, 18 S. Ct. 774, 42 L. Ed. 1162 (1898), the Court, after reviewing the method of alleging the offense in the words of the statute, stated:

> "Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense. Where the statute completely covers the offense, the indictment need not be more complete by specifying particulars elsewhere obtained."

It would seem, however, that this Court is not so much concerned with the allegations of the elements of the crime as it is with the fact that the defendant is not informed as to the "inhibition in the law (he) is accused

of having violated". That is, there may be a failure to apprise the defendant of what he must be prepared to meet. The defendant makes no such claim. But, aside from that fact, the allegation "in a manner other than in accordance with the provisions of Ration Order 5 C (7 Fed. Reg. 9135), as Amended" does inform the defendant fully of the nature of the charge and the law he is alleged to have violated so as to enable him to prepare any defense he may have. Further, because judicial notice must be taken of the Ration Order 5 C, it is not necessary to more fully allege the provisions thereof. Title 44 U. S. C. §307; *United States v. Casey,* 247 F. 362 (D. C. E. D. Ohio, 1918); *Zuziak v. United States,* 119 F. (2d) 140 (C. C. A. 9th 1941).

Ration Order 5 C provides under title "General Provisions with Respect to Transfers and Use" and the subdivision thereof on "Restrictions on Transfers" that there shall be no transfer of gasoline except in exchange for valid coupons (Section 1394.8152). The subdivision following is entitled "Prohibited Acts" and includes the section charged herein. The assumed difficulty of defendant's counsel in finding out exactly what defendant was charged with bears little weight in face of the argument that all counsel had to do would be to quickly refer to the Ration Order which was published in the Federal Register and of which he must take notice. The defendant, therefore, knew as a matter of law that he was charged with transferring the coupons involved without receiving gasoline therefor. The matter is as simple as that and the defendant's attempt to hide behind a cloak of difficulty is a

sham both from a practical as well as a legal standpoint. Had he been serious in his contention, rather than desirous of raising a technicality, a Motion for Bill of Particulars would have solved his uncertainty.

Appellee will not reiterate the argument made in Point I of its brief except to state that the rule enunciated in the *Peters* case when applied to the information herein, indicates the sufficiency thereof. However, appellee does desire to refer to a few cases in which general allegations similar to that complained about in the instant case have been held sufficient in the face of like objections.

In *Ledbetter v. United States, supra,* the indictment charged, in the words of the statute, that the defendant did "carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law". The sufficiency of the indictment was attacked on the ground that it did not state facts constituting an offense because it should have set forth the particular facts which showed that the defendant was a retail liquor dealer and that he had not paid the tax of $25.00 provided by law. The Court held that the indictment was sufficient because it alleged the crime in the words of the statute and the *particulars which the defendant desired were elsewhere obtained,* to-wit: in the statute.

Likewise, in *Taran v. United States*, 88 F. (2d) 54 (C. C. A. 8th 1937), the indictment charged the defendant with carrying on the business of a wholesale liquor dealer in one count and a retail liquor dealer in the second count. These two counts were challenged by demur-

rer as being insufficient because they were indefinite, vague and uncertain in that they did not set out any acts or facts which were claimed to constitute these offenses. The Court stated as follows:

> "The function and purpose of the indictment is to advise the accused of the nature of the accusation against him, with such certainty as to enable him to prepare his defense, and so that he may not be taken by surprise by the evidence offered at the trial, also that he may be protected after judgment against another prosecution for the same offense. Wolpa v. United States (C. C. A. 8) 86 F. (2d) 35. It is generally sufficient to charge a statutory offense in the language of the statute, particularly if the statute expressly defines the offense. Galatas v. United States (C. C. A. 8) 80 F. (2d) 15; Myers v. United States (C. C. A. 8) 15 F. (2d) 977, Ledbetter v. United States, 170 U. S. 606, 18 S. Ct. 774, 42 L. Ed. 1162. Counts 1 and 2 of the indictment followed the language of the statute, and the statute specifically defines what constitutes a 'retail liquor dealer' and what constitutes a 'wholesale liquor dealer.' One who sells in quantities of less than five gallons is by the specific wording of the statute made a retail liquor dealer, while one who sells in quantities in excess of five gallons is made a wholesale liquor dealer. The defendant, therefore, knew as a matter of law that he was charged by the first count with selling liquor in quantities of less than five gallons, and that by the second count he was charged with selling liquor in quantities in excess of five gallons. It was not essential to set out the particular acts constituting the business, where, as here, the statute specifically defines what acts constitute such business."

In *Pounds v. United States,* 171 U. S. 35, 18 S. Ct. 729, 43 L. Ed. 62 (1898), the indictment charged the concealment of distilled spirits "which said spirits had been removed to a place other than the distillery warehouse provided by law" in the words of the statute. It was claimed that the indictment was too uncertain to sustain the judgment because it did not inform the defendant that a warehouse was provided in which the spirits which he is charged to have concealed should have been stored until the tax was paid. The Court held the indictment sufficient because it was enough to charge the defendant "with acts coming within the statutory description in the substantial words of the statute without any further explanation of the matter". In *Hanks v. United States,* 97 F. (2d) 309 (C. C. A. 4th 1938), the Court held that the very allegation considered in the *Pounds* case was sufficient to negative the exception to the law because it was not necessary to allege all the elements of the offense with technical precision.

In *Ruffino v. United States,* 114 F. (2d) 696 (C. C. A. 9th 1940), the indictment charged that the defendant was not a person permitted to acquire gold bullion pursuant to Treasury regulations. There was no other allegation showing why the defendant was not such a person or what the regulations were that prevented him from acquiring the bullion. But this Court held that the language substantially negatived the possession of a license which was apparently necessary. It should be noted that

the ruling was *dictum* because it concerned an allegation in connection with defensive matter which need not have been alleged in the first place; however, the Court made a specific ruling which it felt correct.

In *Zuziak v. United States, supra,* in which the defendant was convicted of a violation of the Selective Training and Service Act of 1940, this Court went so far as to hold that there was no need to plead the issuance or violation of regulations because the Court took judicial notice thereof and that as such indictment fully informed the accused of the nature of the charge so as to enable him to prepare any defense he might have, nothing more specific in the matter of form was required.

As pointed out on page 6 of Appellee's Brief, the defendant does not claim any prejudice in this matter. He only claims that he could not or that it was difficult to find the particular Ration Order even though the citation to the Federal Register was alleged in the information. It is contended that the information fully informs the defendant of all the elements of the crime with sufficient certainty for him to prepare his defense or to raise the plea of second jeopardy, if necessary. Certainly, the allegation in connection with the order is no more indefinite or insufficient than those which have been upheld in this and other courts. Any complaint made to the information would seem to be a pure technicality upon which a reversal cannot be urged. See:

> *Hopper v. United States,* 142 F. (2d) 181 (C. C. A. 9th, 1943).

Conclusion.

It is respectfully submitted that the instructions of the court were sufficient in view of the facts of the case as presented to the jury and that no prejudicial error was committed by the court in failing to give further instructions. It is further submitted that the Information states a public offense under the laws of the United States and that a petition for rehearing should be granted and the judgment affirmed.

Respectfully submitted,

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Certificate of Counsel.

We, counsel for the United States of America, appellee in the above entitled cause, do hereby certify that the foregoing Petition for Rehearing of this cause in our opinion is well founded and is not interposed for delay.

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